

Approved For Release 2007/02/08 : CIA-RDP96M01138R001200030005-9

OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

30 March 1977

MEMORANDUM FOR SECRETARY OF THE ARMY

Attention: Chief of Legislative Liaison

SECRETARY OF THE NAVY

Attention: Chief of Legislative Affairs

SECRETARY OF THE AIR FORCE

Attention: Director, Legislative Liaison

ASSISTANT SECRETARY OF DEFENSE

(Health Affairs)

ASSISTANT SECRETARY OF DEFENSE

(Manpower and Reserve Affairs)

ASSISTANT SECRETARY OF DEFENSE

(Public Affairs)

ASSISTANT TO THE SECRETARY OF DEFENSE

(Legislative Affairs)

DEPUTY ASSISTANT SECRETARY OF DEFENSE

(Administration), OASD (Comptroller)

DIRECTOR, DEFENSE INVESTIGATIVE SERVICE

INFORMATION FOR ASSISTANT GENERAL COUNSEL

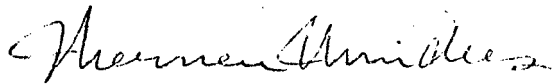
(Manpower, Health and Public Affairs)

SUBJECT: Revised proposed Executive order, Governing Qualifications for Membership in the Armed Forces and Security Requirements for Members of the Armed Forces. (D/D E.O. Doc 219)

Comments of the addressees on the attached draft Executive order are requested not later than April 16, 1977.

On file OSD release instructions apply.

Addressees are specifically requested to comment on the legality and desirability of listing and thereby highlighting sexual perversion as a separate criterion in determining whether to deny membership in the armed forces for security reasons to an applicant, or to deny access to classified information to a military member. The Office of the General Counsel has expressed a concern that it may be more difficult to prevail in lawsuits where aberrant sexual conduct is deemed relevant to the suitability determination except under circumstances in which it can be established that the individual's "sexual perversion" may subject him to undue coercion, influence or pressure that would cause him to act contrary to the national interest. It should be kept in mind that under current enlistment qualifications as prescribed under Part I of this Order it will still be possible to disqualify an applicant for membership on the basis of aberrant sexual behavior for not meeting the general fitness (as opposed to national security) qualifications for enlistment. Addressees are requested to address this issue in their comments and indicate from both a legal and a policy standpoint whether sexual perversion should be retained as a separate item in section 207(a)(6), or whether it should be deleted from section 207(a) on the grounds that it is sufficiently covered by the general language in section 207(b)(1) and (2).



Werner Windus
Director
Legislative Reference Service

Enclosure



Approved For Release 2007/02/08 : CIA-RDP96M01138R001200030005-9
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D. C. 20301

Mr. William M. Nichols
General Counsel
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Nichols:

In compliance with the provisions of Executive Order 11030, there is transmitted herewith a proposed Executive order governing qualifications for membership in the Armed Forces and security requirements for membership and retention in the Armed Forces. It is requested that this proposed Executive order be submitted to the President for his approval and signature.

The Privacy Act of 1974, Public Law 93-579 (December 31, 1974) requires each agency that maintains a system of records to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive Order of the President (see 5 U.S.C. 552a(e)(1)). There is no statute or Executive Order authorizing the military personnel security program that is currently in existence. This program necessarily involves the keeping of records on individuals about whom security investigations have been conducted. Accordingly, the primary purpose of this proposed Executive order is to establish authority for a military personnel security program, which is covered by Part II of the proposed order.

A second purpose of the proposed Executive order, contained in Part I thereof, is to authorize the Secretaries of the military departments to have access to all records at the Federal, State and local level which may be relevant to making a determination as to whether the applicant has the proper qualifications for membership in the Armed Forces. Department of Justice Order No. 601-75 (28 CFR 20.1-20.38) provides that a Federal agency may have access to juvenile and adult criminal records of State, local and Federal agencies only if the Federal agency concerned is authorized by statute or Executive Order either: (1) to conduct investigations to determine employment suitability or eligibility for security clearances; or (2) if that agency requires criminal history record information in order to implement an Executive Order that expressly refers to criminal conduct and contains requirements and/or exclusions expressly based on such conduct. Section 102 of the proposed order is designed to meet the requirement of Department of Justice Order No. 601-75 that a Federal agency must be authorized by statute or Executive Order to have access to such records, including all criminal history

records maintained by the Department of Justice. Section 202 of the proposed Executive order contains a similar provision authorizing the Secretary of Defense to have access to such records for the purpose of conducting security investigations upon military personnel.

Sections 201 and 202 of the proposed Executive order establish a centralized military personnel security program under the jurisdiction of the Secretary of Defense. Groups which have studied recently the problem of security investigations, including the Domestic Council Committee on the Right of Privacy (Project 10), the House Appropriations Committee, the General Accounting Office, and the Department of Defense Personnel Security Working Group, have all developed findings supporting greater centralization with respect to personnel security programs.

Section 203 imposes strict limitations on the scope and type of investigations that may be conducted and on the type of investigative procedures that may be used. Sections 204 and 205 prescribe procedures for designating positions as sensitive and prescribe the investigative requirements for such positions.

Section 206 of the proposed order establishes two separate security standards for military personnel. One standard applies to suitability for entrance and retention in the Armed Forces, and the other standard applies to suitability for a security clearance or assignment to sensitive duties. The first standard is more general, designed to determine whether the individual is suitable for reasons of national security to become a member of or be retained in the Armed Forces. The second is more narrowly drawn to apply only to those military members who need access to classified information or who will be assigned to sensitive duties.

Section 207 of the proposed order establishes general criteria to be used in making determinations as to whether an individual meets one of the standards.

There is need to define more clearly the procedures used to deny or revoke a military member's access to classified information, remove a member from assignment to sensitive duties, or separate a member for reasons of national security. Section 208 establishes a due process procedure which must be followed whenever any such action is being taken with regard to military personnel.

Sections 209 and 210 of the proposed order require the Secretary of Defense to establish a system for program management, to conduct a continuing review of the military personnel security program, and to submit to the National Security Council annually a report, with recommendations on the status of that program.

Part III of the proposed Order provides that Part I of the order shall become effective immediately and that Part II, which applies to the military personnel security program, shall become effective 180 days after the date of signature. The latter provision is necessary in order to provide sufficient time to establish and implement the centralized personnel security program.

Sincerely,

PROPOSED EXECUTIVE ORDER NO. _____

QUALIFICATIONS FOR MEMBERSHIP IN
THE ARMED FORCES AND SECURITY
REQUIREMENTS FOR MEMBERS OF THE
ARMED FORCES

WHEREAS the national interests require that all persons privileged to be members of the Armed Forces shall be reliable, of good conduct and character, and of undivided allegiance and unswerving loyalty to the United States; and

WHEREAS the national security and welfare require that only persons who have demonstrated integrity, trustworthiness and discretion of the highest order shall be in positions of special trust and that the selection of such persons shall be made on the basis of a comprehensive review of their suitability and qualifications to hold such positions; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of membership or privileged to be a member of the Armed Forces be adjudged by standards and procedures that are consistent, uniform and comport with the individual's right of privacy:

By virtue of the authority vested in me by the Constitution of the United States as President of the United States and Commander in Chief of the Armed Forces of the United States, deeming such action necessary to the national security, it is hereby ordered as follows:

PART I -- GENERAL QUALIFICATIONS FOR MEMBERSHIP

IN THE ARMED FORCES

Section 101(a). Authority to Prescribe Fitness Qualifications.

In accordance with sections 505, 508, and 510 of title 10, United States Code, "the Secretary concerned," which in Part I of this order shall mean the Secretaries of the military departments and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe physical, mental, moral, and educational qualifications for the enlistment, reenlistment, appointment, and induction (when authorized by law) of persons in the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps, and the Coast Guard.

(b) Persons Who May Not Be Enlisted.

In accordance with section 504 of title 10, United States Code, no person who is insane, intoxicated, or a deserter from an armed force or who has been convicted of a felony may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies.

Section 102. Authority to Conduct Investigations and Have Access to Records.

(a) The Secretary concerned or his designee is authorized to make inquiries and to conduct investigations to determine the eligibility for membership in the armed force or forces under his jurisdiction of applicants for enlistment, reenlistment, appointment, or induction (when authorized by law) therein, in order to insure that such applicants or members meet the fitness qualifications prescribed in accordance with section 101 of this order. During the course of the investigations conducted under this section, the Secretary concerned or his designee (including a member engaged in recruiting duties) is authorized to obtain information from any source (unless prohibited by State law)

including but not limited to the following--

- (1) the prospective member;
- (2) the parent(s) or guardian(s) of the prospective member;
- (3) school records;
- (4) Federal, State, and local official government records, including arrest records, Court proceedings and probation records regarding both adult criminals and juvenile offenders;
- (5) employment records;
- (6) medical records;
- (7) personal references; and
- (8) other references developed during the course of the inquiry or investigation.

The criminal and juvenile offender information which the Secretary concerned or his designee is authorized to obtain under this section includes, but is not limited to: (1) all criminal history record information relating to arrests, detentions, indictments, informations, or other formal criminal charges; and any disposition arising therefrom, including sentencing and correctional supervision and release; and (2) all such records relating to the apprehension, adjudication, disposition and correctional supervision of a juvenile as delinquent or in need of supervision (or the equivalent). The Secretary concerned is authorized to receive any such records which are maintained in any Department of Justice criminal history record information system, including the Identification and Investigative files maintained by the Federal Bureau of Investigation.

(b) Juvenile offender information made available to any armed force under this section shall be destroyed once a decision is made that an applicant is not accepted for service in the armed forces. When an applicant is accepted, such juvenile offender information shall be made a part of the personnel security investigation authorized under section

(b) With regard to investigations conducted under Part II of this

Order, questions regarding personal and domestic affairs, national origin, financial matters, and the status of physical health should not be made unless the question is relevant to the disqualification criteria of section 207 of this Order. The probing of a person's thoughts or beliefs, and questions about his conduct which have no personnel security standard implications are unwarranted. Similarly, religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies, and affiliation with labor unions or fraternal organizations are not proper subjects for such inquiries, except where this information relates to the disqualification criteria of section 207 of this order or if it constitutes a bona fide qualification for a particular assignment under the standard prescribed by section 206(b) of this order.

(c) In conducting investigations under the provisions of Part II of this order, an investigator--

(1) may not investigate any case or person except those assigned within his lawful duties;

(2) may not interview sources of information where the testimony is likely to be overheard by others;

(3) shall always present credentials and inform sources of information as to the reasons for the investigation, the use that will be made of the testimony, and the fact that all information provided, including the source's identity, must be disclosed to the individual being investigated upon that individual's request unless the source requests confidentiality under 5 U.S.C. 552a;

(4) may not furnish information to the source, other than necessary identity data, or ask questions in such a manner as to indicate that the investigator is in possession of derogatory information concerning the subject of the investigation;

prospective member of the armed forces to sensitive duties, including those requiring clearance for access to classified information.

(b) Except as otherwise provided by law of Executive Order, investigations conducted under the authority of Part II of this Order shall be conducted only for the purpose of determining suitability for entrance and retention in the armed forces under the standard prescribed by section 206(a) of this Order, or to determine suitability for access to information classified in accordance with Executive Order 11652 or assignment to sensitive duties under the standard prescribed by section 206(b) of this Order. The scope of the two types of investigations shall be determined under criteria prescribed by the Secretary concerned, based on the information needed in order to make a determination as to whether the person concerned meets the standard prescribed by either section 206(a) or 206(b) of this Order.

(c) During the course of such investigations, the component or components designated by the secretary concerned are authorized to obtain information from any source (unless prohibited by State law), including those sources listed in section 102(a) of this Order and any criminal history record information maintained by the Department of Justice.

Section 203. Investigative Limitations.

(a) Investigations conducted under the provisions of either Part I or Part II of this Order shall be designed insofar as possible to collect only as much information as is relevant and necessary to make the required determination under section 101 of this Order or under the appropriate standard prescribed by section 206(a) or (b) of this Order, to develop information that is timely and that avoids unnecessary inquiry into sensitive or private areas of personal behavior, and to report for use in a final determination only information that is accurate and as fully corroborated as possible. Inquiries which have no relevance to the personnel fitness or security standards prescribed by this Order should not be made.

202 of this order, but may not be made a part of the member's personnel file or any other file at any time.

PART II -- MILITARY PERSONNEL

SECURITY PROGRAM

Section 201. Establishment of Military Personnel Security Program.

(a) The "Secretary concerned," which in Part II of this order shall mean the Secretary of Defense and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, is responsible for maintaining within his department an effective, uniform and centralized military personnel security program to insure that the acceptance and retention of members of the armed forces and their assignment to sensitive duties, including those requiring access to information classified in accordance with Executive Order 11652 is clearly consistent with the national interest.

(b) The Secretary concerned shall enforce and maintain the highest standards of loyalty within the armed forces, pursuant to applicable statutes and the Uniform Code of Military Justice. No member shall be given access to classified information or otherwise assigned to sensitive duties unless such member has been determined to be trustworthy under the procedures set forth in this order.

(c) The purpose of the procedures which follow are to preserve the integrity of classified information and protect the national interest, while providing the maximum possible safeguards to protect the interests of the individuals affected thereby.

Section 202. Authority to Conduct Investigations and Have Access to Relevant Records.

(a) The Secretary concerned, through the component or components designated by him, shall require a personnel security investigation to be conducted with respect to every inductee (when induction is authorized by law) and every applicant for an enlistment, warrant or commission in the armed forces, and with respect to the assignment of any member or

(6) may not investigate any case in which the investigator knows of circumstances which might adversely affect his fairness, impartiality or objectivity; and

(7) may not, without the consent of the individual, conduct physical searches of the subject or his property.

Section 204. Designation of Sensitive Positions and Investigative Requirements for Such Positions.

(a) The Secretary concerned or his designee shall designate as sensitive positions, by degree of sensitivity including the need for clearance for access to classified information, those positions the occupant of which could bring about a material adverse effect upon the national interest.

(b) A person may be granted clearance for access to classified information or assigned to a sensitive position only upon the completion of a personnel security investigation upon him which meets the prerequisite scope established by the Secretary concerned, resulting in a finding that he has met the standard prescribed by section 206(b) of this order. In case of emergency, a sensitive position may be occupied on an interim basis, by a person on whom the prerequisite personnel security investigation has not been completed, upon the recorded determination by the Secretary concerned or his designee that such action is in the national interest, provided that the prerequisite investigation is requested at the time of or before such a determination.

(c) An investigation conducted to determine suitability for entrance or retention in the armed forces may also be used for the purpose of determining suitability for a personnel security clearance or assignment to a sensitive position and vice versa, provided that the investigation meets the requisite scope prescribed by the Secretary concerned.

(d) Should there develop at any stage of investigation adverse or questionable information which may impact upon the subject's eligibility for access to classified information or assignment to sensitive duties, as the case may be, the investigation shall be expanded as necessary to resolve the issue. Further, whenever adverse or questionable information is developed during the course of an investigation, the subject of the investigation shall be afforded an opportunity to affirm, refute or otherwise explain such information prior to closing the investigation, unless to do so would jeopardize a pending criminal or national security investigation.

(e) A member of the Armed Forces may be reinvestigated for the purpose of determining his suitability for retention in the armed forces or for a personnel security clearance or assignment to sensitive duties only if: (1) there has been a break in the member's military service greater than one year; (2) information becomes available which raises reasonable doubt as to whether he continues to meet the appropriate standard prescribed by section 206 of this order; (3) he has been cleared for access to Confidential or Secret information and is being assigned to duties requiring access to Top Secret information or some other category of information requiring a greater degree of protection; or (4) he is assigned to or being considered for assignment to certain sensitive duties for which the Secretary concerned has prescribed re-investigation requirements other than as indicated above.

Section 205. Evaluation by Designated Authorities.

All relevant information which is developed for the purpose of determining whether the individual meets the appropriate personnel security standard prescribed by section 206 of this Order, or such other pertinent information as otherwise becomes available, shall be reviewed and evaluated by authorities specifically designated by the Secretary concerned, on the basis of the criteria detailed in section 207 of this Order.

Section 206. Personnel Security Standards.

(a) Suitability for Entrance and Retention in the Armed Forces.

The personnel security standard which must be applied in determining whether a person is suitable under national security criteria to become a member of or be retained in the armed forces is whether, based on all available information, there is substantial basis for doubting his loyalty to the Government of the United States.

(b) Suitability for Access to Classified Information or Assignment to Sensitive Duties.

(1) The personnel security standard which must be applied to determine whether a member is suitable for access to classified information or assignment to sensitive duties is whether, based on all available information, his reliability and trustworthiness are such that entrusting him with classified information or assigning him to sensitive duties is clearly consistent with the national interest.

(2) Only United States citizens shall be assigned to sensitive positions or granted access to classified information unless the Secretary concerned or his designee has determined that, based on all available relevant information, it is in the national interest, considering the individual's special expertise which is not otherwise available to assign a particular non-U.S. citizen to sensitive duties or grant him access to classified information; in such cases the determination and the rationale therefore shall be set forth in writing and made a part of the records of the Department concerned. Only in the rarest of circumstances shall a non-U.S. citizen be granted access to classified information.

Section 207. Disqualification Criteria.

(a) The following criteria may be used in making a determination as to whether an individual meets the standard set forth in subsection (a) of section 206 of this Order:

(1) misconduct in prior military service or civilian

employment;

- (2) criminal or dishonest conduct;
- (3) financial irresponsibility;
- (4) intentional false statement or deception or fraud in application for enlistment or appointment;
- (5) habitual use of intoxicating beverages to excess;
- (6) abuse of narcotics, drugs, or other controlled substances;
- (7) sexual perversion; and
- (8) any other factor which raises reasonable doubt as to the loyalty of the person concerned to the Government of the United States.

(b) Any of the criteria listed in subsection (a) above as well as the following criteria may be used in making a determination as to whether an individual meets the standard set forth in subsection (b) of section 206 of this order:

(1) any facts, circumstances, or conduct which furnish reason to believe that the person concerned may be subject to coercion, influence or pressure which could cause him to act contrary to the national interest;

(2) any facts, circumstances or conduct which indicates poor judgment, unreliability or untrustworthiness suggesting that the person concerned might fail to safeguard classified information, deliberately or inadvertently, or may not be suitable for assignment to sensitive duties;

(3) any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the person concerned, with due regard to the transient or continuing effect of the illness and medical findings in such case;

(4) wanton or reckless disregard of public law, statutes, Executive Orders or willful disregard of security regulations; and

(5) refusal or intentional failure without satisfactory explanation to provide material facts in a personal history statement or security form, or otherwise intentionally failing or refusing without satisfactory explanation, in the course of an investigation, interrogation, or hearing, to answer or to authorize others to answer any material questions regarding the matters set forth in subsections (a) or (b) of this section.

(c) The ultimate determination under this section must be an overall common sense determination based on all available information which may be pertinent in any individual case including, but not limited to, such factors as--

(1) the nature and sensitivity of the assignment for which the member is being considered;

(2) the seriousness of, and circumstances surrounding, the facts, including the person's motivation with respect to particular conduct;

(3) the frequency and recency of the conduct;

(4) the age of the person at the time of the conduct;

(5) the extent to which the conduct was voluntary and undertaken with knowledge of the circumstances involved;

(6) the absence or presence of rehabilitation or effort toward rehabilitation; and

(7) the probability that such conduct will continue in the future.

(d) No adverse determination shall be made except on the basis of information which is as complete as circumstances allow. Criminal history information which does not show final disposition must be investigated further to ascertain the disposition and reasons therefor.

Section 208. Procedures to Deny or Revoke Access to Classified Information, Bar or Remove a Member from Assignment to Sensitive Duties, or Discharge a Member for Reasons of National Security.

(a) Action may be taken under the military personnel security program for reasons of national security to discharge a member, to deny or revoke access to classified information, or to bar or remove a member from assignment to sensitive duties if a determination is made, with respect to any of the criteria listed in section 207 of this order, that the member does not meet the relevant standard prescribed by section 206 of this order.

(b) Should there develop at any stage of the investigation, or at any time after a member has been granted access to classified information or assigned to sensitive duties, information indicating that his having access to classified information or being assigned to sensitive duties may not meet the standards prescribed by section 206(b) of this order, the Secretary concerned or his designee may immediately suspend the member's access to classified information or assignment to sensitive duties. Any member whose access to classified information is finally revoked or assignment to sensitive duties is similarly barred or who has been discharged from an armed force under the provisions of the military personnel security program, shall not be accepted for reentry into the armed forces, granted access to information, or reassigned to sensitive duties unless the Secretary concerned or his designee finds that such action is clearly consistent with the national interest.

(c) Except as provided in subsection (d) of this section, no member shall be determined finally to be unsuitable for access to classified information or assignment to sensitive duties, reassigned to nonsensitive duties or duties of a lesser degree of sensitivity, or involuntarily discharged from the armed forces, for reasons that he does not meet the pertinent standard prescribed by section 206 of this Order, unless the member concerned has been given--

(1) a written statement of the reasons why he has been found unsuitable for access to classified information, assignment to sensitive duties, or retention in the armed forces, which shall be as comprehensive and as detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) and national security permit;

(2) a reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons;

(3) an opportunity to appear personally and to present oral or written evidence before such authority as the Secretary concerned may designate, for the purpose of supporting his reply to the statement of reasons and his assertion of suitability for access to classified information, assignment to sensitive duties, or retention in the armed forces;

(4) a reasonable time to prepare for that appearance;

(5) a written notice of the determination and of the specific reasons therefor in his case; and

(6) a written notice of the right to appeal an adverse determination within the chain of command to an official of flag or general rank designated under the authority of the Secretary concerned.

(d) Notwithstanding subsection (c) of this section or any other provision of this Order, nothing in this Order shall be deemed to limit or affect the responsibility and powers of the Secretary concerned to find that a person is not suitable for entrance or retention in the armed forces, or is ineligible for a security clearance or assignment to sensitive duties, if the national security so requires. Such authority may not be delegated and may be exercised only when it is determined that the procedures prescribed in subsection (c) of this section are not appropriate. Such determination shall be conclusive.

Section 209. Program Management.

(a) The Secretary concerned shall develop and issue such directives, regulations and other pertinent instructions as he deems necessary to insure full and continuing implementation of this Order.

(b) In order to avoid unnecessary and duplicative investigation, the Secretary concerned shall insure that a central index and records repository is maintained within which reports of investigation developed under the provisions of this Order shall be indexed and filed under conditions which protect the privacy of the persons concerned and assure the national interest. Access to such reports shall be controlled by procedures prescribed by the Secretary concerned. Except as otherwise authorized by 5 U.S.C. 552 or 552a or other statute or Executive Order, such reports may not be made available for any purpose other than to administer the military personnel security program established by this Order or to compile management and statistical information necessary for the effective management of this program.

(c) The Secretary concerned shall ensure that a record is maintained of any action taken as a result of each investigation conducted under the provisions of Part II of this Order.

(d) Investigative reports prepared as provided by this Order shall be retained or destroyed in accordance with procedures and schedules approved under chapter 33 of title 44, United States Code, or as otherwise provided by law.

Section 210. Program Oversight.

In order to assure full and continuing compliance with the provisions of this Order, the Secretary concerned shall effect continuing review of the military personnel security program in his respective department and shall submit annually a report to the President, through the National Security Council, with recommendations to correct any deficiencies in the program which are inconsistent with the interests of national security or the rights of the individual under the Constitution, the laws of the United States, or this Order.

Section 301.

Part I of this order shall become effective immediately.

Section 302.

Part II of this order shall become effective 180 days after the date hereof.